

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CRAIG CUNNINGHAM,

Plaintiff,

v.

Case No. 16-cv-761

MICHAEL MONTES and
TOLLFREEZONE.COM, INC.

Defendants.

**DEFENDANTS' OBJECTIONS
TO PLAINTIFF'S BILL OF COSTS**

NOW COME Defendants, by and through their legal counsel, and object to the following cost items contained in the bill of costs [Dkt 211] filed by Plaintiff:

A. 10/02/2017 Printing for Seventh Circuit Court of Appeals Filing - \$155.00.

Fed. R. Civ. P. 54(d)(1) only permits recoverable costs to the "prevailing party." The cost at issue concerns printing of briefs for the appeal to the Seventh Circuit Court of Appeals. Plaintiff was not the prevailing party on appeal. The Seventh Circuit reversed the entry of a default judgment in Plaintiff's favor and remanded the case to the district court for further proceedings. Defendants were the prevailing party on appeal and were awarded costs. Accordingly, this item in Plaintiff's bill of costs should be rejected.

B. 01/17/2019 Attempted Service of Subpoena on Michael Montes - \$115.00.

The award of costs to the prevailing party under Fed. R. Civ. P. 54(d)(1) is discretionary. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974). Costs are appropriately rejected when they were unnecessarily incurred. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 485 (S.D. NY 1970)(costs rejected for attempting personal service upon an individual who was

already a party to lawsuit). Here, Plaintiff incurred costs while the lawsuit was pending in an unsuccessful attempt to serve Defendant Montes with a subpoena. Montes was a represented party when Plaintiff was undertaking this action. Plaintiff could have served a request for production of documents upon Montes' counsel without incurring any costs. Plaintiff's choice to attempt to serve a subpoena was unnecessary and the item of cost for such attempted service should be rejected.

Finally, Defendants had costs approved in their favor against Plaintiff Cunningham in the total amount of \$869.65 following their successful appeal to the Seventh Circuit Court of Appeals. [Dkt 88-2, 97]. Defendants request the approved amount of Plaintiff's costs be offset by this amount. By Defendants' calculations, the amount of Plaintiff's approved bill of costs should be \$4,041.57 (amount requested) - \$270.00 (amount denied) - \$869.65 (amount offset from costs previously entered in Defendants' favor) = \$2,901.92.

Dated this 2nd day of March, 2020.

AXLEY BRYNELSON, LLP

Electronically signed by Kevin D. Trost

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